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PAUL REICHE III and ROBERT FREDERICK FORD

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

15 STARDOCK SYSTEMS, INC.,

16 Plaintiff,

17 v.

18 PAUL REICHE III and ROBERT
FREDERICK FORD,

19 Defendants.

Case No. 4:17-CV-07025-SBA

**REICHE AND FORD'S OBJECTIONS
AND MOTION TO STRIKE THE
SECOND DECLARATION OF ROBERT
WEIKERT IN SUPPORT OF
STARDOCK'S MOTION OR, IN THE
ALTERNATIVE, REQUEST FOR LEAVE
TO FILE SUR-REPLY**

Judge: Hon. Saundra B. Armstrong

Complaint Filed: Dec. 8, 2017

Trial Date: June 24, 2019

21 PAUL REICHE III and ROBERT
FREDERICK FORD,

23 Counter-Claimants,

24 v.

25 STARDOCK SYSTEMS, INC.,

26 Counter-Defendant.

27

28

2635.000/1332641.1

Case No. 4:17-CV-07025-SBA

REICHE AND FORD'S OBJECTIONS AND MOTION TO STRIKE
SECOND WEIKERT DECLARATION

1 Defendants and Counter-Claimants Paul Reiche III (“Reiche”) and Robert Frederick Ford
 2 (“Ford”) (collectively, “Reiche and Ford”) hereby submit the following objections to, and move to
 3 strike, the Second Weikert Declaration (“Second Weikert Declaration”) in Support of Stardock’s
 4 *Ex Parte* Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary
 5 Injunction Should Not Be Granted (“Stardock’s PI Motion”).

6 Several exhibits to the Second Weikert Declaration should be stricken as they contain new
 7 material improperly raised on reply. To the extent the Court is inclined to consider this new
 8 material, Stardock requests the Court grant it leave to file a sur-reply in order to address the new
 9 material.

10 **I. THE SECOND WEIKERT DECLARATION IMPROPERLY INCLUDES NEW
 11 MATERIAL ON REPLY**

12 It is improper for the moving party to introduce new facts or different legal arguments in a
 13 reply. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-95 (1990) (court has discretion to
 14 disregard late-filed factual matters); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“district
 15 court need not consider arguments raised for the first time in a reply brief”); *see also Ojo v.
 16 Farmers Group, Inc.*, 565 F.3d 1175, 1186, fn. 12; *Malin v. JPMorgan*, 860 F.Supp.2d 574, 577
 17 (ED TN 2012).

18 If a court relies on new material contained in a reply brief, it **must** afford the opposing
 19 party a reasonable opportunity to respond. *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164-65
 20 (10th Cir. 1998); *see also Lu v. Lezell*, 45 F.Supp.3d 86, 91 (D.D.C 2014) (court may ignore new
 21 arguments in reply or grant leave to file sur-reply).

22 Exhibits B-E of the Second Weikert Declaration constitute new material that Stardock
 23 improperly submitted through the Second Weikert Declaration. By including this new material in
 24 the Second Weikert Declaration, Stardock foreclosed any opportunity for Reiche and Ford to
 25 refute or otherwise respond to it. These purported facts were surely available to Stardock at the
 26 time it filed its opening motion, and could have and should have been included in the Original
 27 Weikert Declaration—Stardock offers no explanation as to why this information was not
 28 previously raised so that Reiche and Ford would have a reasonable opportunity to respond to it.

1 New Material in Second Weikert Declaration:

2 ▪ Exhibit B—law review article by Lydia Pallas Loren entitled “Deterring Abuse of
3 the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously,”
4 46 Wake Forest L. rev. 745 (2011).

5 ▪ Exhibit C—law review article by Wendy Seltzer entitled “Free Speech Unmoored
6 in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First
7 Amendment,” Harvard Journal of Law & Technology, Vol. 24, Number 1, Fall
8 2010.

9 ▪ Exhibit D—comments by Automatic Inc. in the Matter of Section 512 Study on file
10 with the United States Copyright Office Library of Congress, Washington D.C.

11 ▪ Exhibit E—excerpt from the U.S. Copyright Office’s Compendium, Chapter 300,
12 Copyrightable Authorship, “Words and Short Phrases.”

13 **II. CONCLUSION**

14 The above-referenced exhibits to the Second Weikert Declaration constitute new material
15 raised for the first time on reply, and they should be stricken. If the Court considers this new
16 material on reply, the Court is required to provide Reiche and Ford with a reasonable opportunity
17 to respond to it. *Beaird*, 145 F.3d at 1164-65.

18
19 DATED: September 24, 2018

20 BARTKO ZANKEL BUNZEL & MILLER
21 A Professional Law Corporation

22 By: /s/ Stephen C. Steinberg

23 Stephen C. Steinberg
24 Attorneys for Defendants and Counter-Claimants
25 PAUL REICHE III and ROBERT FREDERICK
26 FORD